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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1058

ERNESTINE GREENE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 313 F. 2d 148.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1963. The time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including May 1, 1963, and the petition was filed on April 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a statute, transferring from the district court to the court of appeals jurisdiction to review pending deportation orders, deprived petitioner, an Austrian alien, of access to the district court in violation of a treaty between the United States and Austria or the due process clause.

2. Whether petitioner was denied due process in that she was not advised that she could be represented by an attorney before giving an Immigration Service investigator sworn statements which were later introduced in evidence at her deportation hearing.

3. Whether the statute, which provides for the deportation of "[a]liens who are prostitutes or who have engaged in prostitution" is unconstitutionally vague because it does not define "prostitution."

4. Whether acts of prostitution, committed by petitioner subsequent to her original entry into the United States but prior to a later re-entry, constituted a valid basis for deportation.

5. Whether the order for petitioner's deportation was supported by reasonable, substantial, and probative evidence.

6. Whether the Board of Immigration Appeals properly denied petitioner's motion to reopen the deportation proceedings on the basis of alleged newly discovered evidence.

STATEMENT

1. On March 21, 1961, petitioner filed a complaint in the United States District Court for the Southern District of California pursuant to 28 U.S.C. 2201 and

5 U.S.C. 1009 for a declaratory judgment attacking an order which declared her deportable as an alien who, after entry, had engaged in prostitution. After answer but before trial, Public Law 87-301, 75 Stat. 650, Appendix, *infra*, p. 13, became effective on October 26, 1961. Section 5(a) of that Act provided that judicial review of deportation orders thereafter was to be by petition to the court of appeals, and Section 5(b) provided for the transfer of pending proceedings for review of deportation orders to the court of appeals. On November 3, 1961, petitioner's pending proceedings were transferred to the court of appeals (Vol. I).[1] On January 17, 1963, the court of appeals upheld the deportation order and ordered the appeal dismissed (Pet. App. 1-9).

At the deportation hearing, petitioner admitted that on March 7, 1960, and on April 6, 1960, she had signed sworn statements concerning her immigration status and had made handwritten changes indicated by her initials (Tr. 8-9). A ten-minute recess was declared so that petitioner's counsel could review these statements. When the examining officer then offered the two statements in evidence the following colloquy occurred (Tr. 10):

> By Counsel: I would like to—I can't object to the introduction into the evidence, I realize

[1] The record is in two volumes. Volume I contains the proceedings in the court of appeals; Volume II contains the administrative proceedings conducted by the Immigration and Naturalization Service. The transcript of the deportation hearing, which is included in Volume II, will be referred to as "Tr."

that, not on the regular grounds, but I would like to state for the record that I have discussed that with my client, the two exhibits that are now in, and she has stated to me that at the time they were made that she was noticeably upset and noticeably confused and that there was a confusion in her mind as to the basic meaning or the legal meaning of prostit..tion. I would like that on record because I have covered that with her.

BY INQUIRY OFFICER TO COUNSEL: Of course you have the right to question her regarding anything in the statements.

BY COUNSEL. I will, sir, thank you.

BY INQUIRY OFFICER: The statements will be received in evidence and marked as one exhibit—

EXHIBIT NO. 2.

The statement of March 7, 1960, recites (p. 1):

INVESTIGATOR to respondent: Q. Mrs. Drake [petitioner], you are informed that I am an investigator in the United States Immigration and Naturalization Service and as such am authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration, Nationality and Alien Registration laws of the United States. I desire to ask you some questions. You do not have to answer my questions. Any statement which you make should be voluntary and you are warned that anything you say here can be used by the Government as evidence in future civil or criminal proceedings against you or anyone else. Do you understand?

A. Yes.

Q. With that understanding are you willing to answer my questions?

A. Yes.

The investigator gave petitioner a similar warning as to her rights prior to her statement of April 6, 1960 (p. 1).

Petitioner said in the statement of March 7, 1960, that she was born in Vienna on February 6, 1927, and is a citizen of Austria; that she entered the United States at New York on June 28, 1952, and has since resided in the United States; that she visited Mexico once in 1956 and once in 1958 or 1959 and reentered the United States on both occasions (pp. 2–4). When the investigator asked petitioner if she knew what the term "prostitute" means, she replied, "Well, yes, if you go out with somebody and they give you some money". The investigator replied that a "prostitute" is "defined as women who have sexual relations with men for money" (p. 7). Petitioner stated that she practiced prostitution in 1956 and 1957 and that she received from $50 to $100 for her acts (p. 7). She had sexual intercourse with "customers" over an approximately eighteen-month period, "sometimes twice a week, sometimes three times a week, sometimes once a week." She stated that, since her income from other employment was "not enough to pay the rent," she started prostitution (p. 9). In the statement of April 6, 1960, petitioner said that she understood that "according to the law a prostitute is a woman who has sexual relations with men for payment of a fee in money" (p. 6).

The Service also introduced at the deportation hearing Exhibit 3, which showed petitioner's conviction on May 3, 1957, on a plea of guilty to a violation of

a Los Angeles County ordinance by unlawfully visiting a house in Los Angeles County for the purpose of having sexual intercourse with a person to whom she was not married. As to this incident, petitioner testified at the deportation hearing that a man known by one of her friends came to her home and became friendly. When she changed to a negligee, the man showed a badge and said that he was a policeman. Petitioner stated that she did not have sexual relations and did not receive any money from him (Tr. 13–15).

The Special Inquiry Officer found that the charge contained in the order to show cause was sustained by reasonable, substantial, and probative evidence and ordered that petitioner be deported. The Board of Immigration Appeals upheld the ruling by the Special Inquiry Officer. On March 9, 1961, the Board of Immigration Appeals denied petitioner's motion to reopen the proceedings to hear allegedly newly discovered evidence that she did not understand the meaning of the term "prostitution," but merely had "affairs" with seven different men, some of whom gave her money or helped to pay her rent (Vol. II,

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 21–22) that Public Law 87–301, 75 Stat. 650 (Appendix, *infra*, p. 13), cut off her right to a full hearing in the district court in violation of the treaty between the United States and Austria guaranteeing "access to the courts of justice * * * in all degrees

of jurisdiction established by law" (see Pet. 2). Congress had power, within the limitations of due process, to confer jurisdiction for the review of deportation orders upon whatever lower federal courts it chose. Petitioner was not deprived of access to the courts of the United States; instead, the statute merely made the court of appeals rather than the district court the initial reviewing tribunal under the applicable American law.

Furthermore, contrary to petitioner's suggestion, the new procedure did not violate due process by depriving her of a plenary trial available only in a district court. The new statute simply substituted the courts of appeals for the district courts. Consequently the issue in the court of appeals was the same as it would have been in the district court—whether, as Section 242 of the Act (Appendix, *infra*, p. 15) requires, the administrative record adequately supported the order of deportation. This Court has repeatedly upheld Congress' power to give the executive branch the power to determine deportability without providing for plenary judicial review. *E.g., Zakonaite* v. *Wolf*, 226 U.S. 272; *United States ex. rel. Turner* v. *Williams*, 194 U.S. 279.

2. Petitioner's sworn statements were taken by an investigator pursuant to authority granted under Section 235 of the Immigration and Nationality Act (Appendix, *infra*, p. 14) to inquire into her right as an alien to reside in the United States. She was advised on each occasion that she did not have to make a statement, and that any statement made could

be used against her in any future civil or criminal proceedings. No claim is made that any coercion was used. At the hearing at which petitioner's deportability was established, petitioner was represented by counsel who expressly stated that she did not object to the admissibility of the statements. She merely contended that petitioner was confused at the time the statements were made.

Petitioner argues (Pet. 13–18) that her statements should not have been admitted at the deportation hearing because she was not affirmatively advised of her right to confer with counsel before the statements were made to the investigator. However, petitioner cannot raise this objection when she failed to object at the hearing to the admission of the statements. Furthermore, even where persons are interrogated by police as to commission of a crime the statements are not deemed involuntary or inadmissible because an accused has not been told of his right to counsel. Cf. *Wilson* v. *United States*, 162 U.S. 613, 623–624; *Morton* v. *United States*, 147 F. 2d 28, 31 (C.A. D.C.), certiorari denied, 324 U.S. 875; *United States* v. *Sinciro*, 193 F. 2d 136, 137 (C.A. 3), certiorari denied, 343 U.S. 904. It follows, *a fortiori*, that an investigator of the Immigration and Naturalization Service is not required to advise a person suspected of being illegally in the United States of the right to counsel since deportation is a civil matter. While petitioner claims that she was confused, her statements show on their face that she clearly understood the questions addressed to her, including the meaning of the term "prostitution."

3. Sections 212 and 241 of the Immigration and Nationality Act provide for the deportation of "[a]liens who are prostitutes or who have engaged in prostitution" "at any time after entry." The statute was not unconstitutionally vague in failing to define "prostitution" (see Pet. 19–20). The term is a common one with a well understood meaning. The statute thus conveys sufficiently "definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *De George*, 341 U.S. 223, 231–232; see *United States* v. *Spector*, 343 U.S. 169.[2]

4. Petitioner argues (Pet. 20) that she could not be deported under Sections 212 and 241 of the Act since the acts of prostitution occurred subsequent to her original entry into the United States and prior to a later reentry. She reasons that the allowance of her subsequent entry was a final determination as to her proper admission and was therefore *res judicata*.

This argument is plainly erroneous. As indicated by this Court's opinion in *Bonetti* v. *Rogers*, 356 U.S. 691, 697, the significant entry for the purpose of deportation for acts after entry is that under which the alien "claims the status and right of lawful presence that is sought to be annulled by his deportation."

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[2] In addition, even assuming the statute was unclear, Congress may enact grounds of deportation retroactively because the *ex post facto* clause of the Constitution does not apply. *E.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Thus, an alien is not constitutionally entitled to advance warning as to grounds of deportation and therefore the statute need not be clear on its face. See the government's brief in *Rosenberg* v. *Fleuti*, No. 248, this Term, pp. 33–35.

Petitioner was admitted for permanent residence in 1952. Accordingly, petitioner's acts of prostitution in 1956 and 1957, subsequent to the 1952 "entry," constituted conduct "after entry" which was basis for deportation under the Act. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *United States* v. *Kenton*, 224 F. 2d 803, 805–806 (C.A. 2). Furthermore, if petitioner's latest entry rather than her entry in 1952 were the crucial one, petitioner was excludable at the time of her latest entry under Section 212 of the Act since she had previously engaged in prostitution and therefore is deportable under Section 241 as a person who at the time of entry was excludable. Petitioner's admission by administrative officers obviously was not a judicial determination of valid entry which could be binding as *res judicata*.

5. Contrary to petitioner's contention (Pet. 20-21) there was reasonable, substantial, and probative evidence to support the deportation order, as required by Section 242(b) of the Act (Appendix, *infra*, p. 15). Petitioner's two sworn statements to the investigator (Exhibit 2) admitting that she engaged in prostitution were alone sufficient to support the deportation order. *Leffer* v. *Nagle*, 22 F. 2d 800, 801 (C.A. 9). Moreover, her Los Angeles conviction of a crime closely related to prostitution tended to corroborate her admissions.

6. The Board of Immigration Appeals did not err in denying petitioner's motion to reopen the deportation proceedings on the ground that she desired to offer new evidence that she did not understand the

meaning of the word prostitution, but merely had affairs with seven different men. The federal courts have uniformly held that the Board's determination whether to permit reopening to reconsider a determination of deportability may be overturned only if the alien demonstrates a clear abuse of discretion. *E. g., Rystad* v. *Boyd*, 246 F. 2d 246, 249 (C.A. 9), certiorari denied, 355 U.S. 912; *Deatico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C.A. 2); see Gordon and Rosenfield, *Immigration Law and Procedure* (1959), pp. 51, 585–586.

Here, the Board plainly did not abuse its discretion. The evidence as to whether petitioner understood the meaning of prostitution was within her own knowledge and control; indeed the evidence she proposes to introduce is her own testimony concerning her state of mind. The Special Inquiry Officer stated at the deportation hearing that petitioner's counsel could question her as to this subject (Tr. 10) but she did not choose to do so. Thus, petitioner had ample opportunity to present evidence at the original hearing. Accordingly, the court below was correct in its ruling that petitioner's motion and affidavit did not present newly discovered evidence. Even if it did, petitioner's claim that she was confused at the time she made the statements is refuted, as noted above, by the statements themselves. Her own proffered testimony that she was confused would not in these cir-

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[1] The allegation in the affidavit that petitioner is now married to a United States citizen, although the statement of a new fact, is immaterial on the question as to her deportability.

cumstances warrant the reopening of the deportation proceedings.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1963.

APPENDIX

Public Law 87-301, 75 Stat. 650, enacted on September 26, 1961, provides in pertinent part:

> "SEC. 5. (a) Title I of the Immigration and Nationality Act (8 U.S.C. 1101) is hereby amended by adding the following:
>
> JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION
>
> SEC. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Title or comparable provisions of any prior Act * * *.
>
> (b) This section shall take effect on the thirtieth day after its approval and, notwithstanding the provisions of any other law, including section 405 of the Immigration and Nationality Act, shall then be applicable to all administrative proceedings involving deportation or exclusion of aliens notwithstanding (1) that the person involved entered the United States prior to the effective date of this section or of the Immigration and Nationality Act or (2) the administrative proceeding was commenced or conducted prior to the effective date of this section or of the Immigration and Nationality Act. Any judicial proceeding to review an order of deportation which is pending unheard in any district court of the United States on the effective date of this section * * *.

shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction to entertain a petition for review under this section. * * *

Section 212 of the Immigration and Nationality Act, 8 U.S.C. 1182, provides in pertinent part:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(12) Aliens who are prostitutes or who have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution * * *.

Section 235 of the Immigration and Nationality Act, 8 U.S.C. 1225, provides in pertinent part:

(a) * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. * * *

Section 241 of the Immigration and Nationality Act, 8 U.S.C. 1251, provides in pertinent part:

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a) * * *.

Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, provides in pertinent part:

* * * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. * * *

* * * * *

8 C.F.R. 3.2 provides in pertinent part:

Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a

decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing * * *.

* * * * * *

8 C.F.R. 3.8 provides in pertinent part:

Motion to reopen or motion to reconsider.

(a) *Form.* * * * Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

* * * * * *

8 C.F.R. 242.10 provides:

Representation by counsel.—The respondent may be represented at the hearing by an attorney or other representatives qualified under Part 292 of this chapter.

* * * * * *

8 C.F.R. 242.14 provides in pertinent part:

Evidence—(a) *Sufficiency.*—A determination of deportability shall not be valid unless based on reasonable, substantial, and probative evidence.

* * * * * *

(c) *Use of prior statements.*—The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial.

* * * * *

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